VIRGINIA LAW REGISTER

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109th Virginia.

Were we disposed to slang we would say that an examination of 109th Virginia looks to us very much as if the judges of our circuit courts had "Got it in the neck." There are one hundred and fourteen cases reported—one hundred and three civil cases and eleven criminal cases. Of the civil cases forty-three are affirmed and fifty-eight reversed; writ is denied in one case, which amounts to an affirmation, and an appeal is dismissed in the other. In the criminal cases two are affirmed and nine reversed. It is true that these reports do not take into consideration the number of writs of error or appeals which are refused and which therefore amount to an affirmation of the lower court, but it does seem to us that the percentage of reversals in the cases in which appeals or writs of error are allowed is exceedingly large, judging by the present volume.

Every case in this book, without exception, has been either annotated or digested in the REGISTER, so that a more extended notice is hardly necessary.

An examination of this volume from a mechanical standpoint convinces us that in fifty years, unless a better class of paper is used in the manufacture of these books, they will practically be useless. No volume of reports should be allowed to be printed on pulp paper, as this book evidently is, and volumes of as much importance as Virginia State Reports surely should be gotten up upon the very best material. They are not ephemeral books to be glanced at and thrown aside, but to be quoted for a century or more to come. The very best linen paper ought therefore to be used in these volumes.

Decisions of the Courts as a Rule of Property.

In the case of Saffell *v.* Orr, 109 Va. 768, the Court very briefly alludes to the effect of decisions as a rule of property. In this case a married woman's certificate of acknowledgment to a deed to lands owned by her was held to be defective and the property was conveyed by order of court back to her after her husband's death. She sold and conveyed to her son-in-law in 1892 and in 1897 this son-in-law conveyed to a third person. An infant heir of the purchaser under the deed as to which the Court had held the certificate defective, on arriving at majority sued this third person, contending that the certificate of acknowledgment was valid and that a good title passed under the deed to which it was attached. The Court sustained this contention and held that the purchaser under the widow's second deed took no title. Counsel for this purchaser contended that the decisions in Hockman *v.* McClanahan, 87 Va. 33, and Clinch River Veneer Co. *v.* Kurth, 90 Va. 737, having been decided prior to their purchase, constituted a rule of property, and that therefore neither the son-in-law nor his grantee could be disturbed in their rights.

Geil *v.* Geil, 101 Va. 773, overruled Hockman *v.* McClanahan and Clinch River *v.* Kurth since this purchase.

We have always believed that these last two cases were wrongfully decided and that their reversal was proper; but the question is should a title based upon the decision of those two cases and acquired before any reversal of the principle decided by them, be destroyed. We think not. It is true that the Court in Geil *v.* Geil says that the Hockman and the Clinch River cases *supra* established no rule of property. Why not? In the case of the Ohio Life & Trust Co. *v.* Debolt, 16 Howard 432, the Supreme Court of the United States said:

> "The sound and true rule is that if the contract when made was valid by the laws of the state as then expounded by all departments of the government and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation or *decision of its courts* (italics ours) altering the construction of the law."

And in Farrior *v.* N. S. Mortgage Co., 92 Ala. 176 (see 8 Va.

Law Register, p. 56), a case arose somewhat similar to the Saffell case. The Supreme Court of Alabama had decided that a mortgage given by a married woman conveying an equitable estate was valid. After that decision a married woman executed such a mortgage. Subsequently the Supreme Court reversed itself upon the point in question and when a suit was brought to foreclose the mortgage and the Court had to pass upon its validity it was held to be valid, the Court saying:

> "Persons contracting are presumed to know the existing law, but neither they nor their legal advisers are expected to know the law better than the courts or to know what the law will be at some future day. Any principle or rule which deprives a person of property acquired by him, or the benefits of a contract entered into, in reliance upon and strict compliance with the law in all respects as interpreted and promulgated by the court of last resort, at the time of the transaction, and no fault can be imputed to him in the matter of the contract—unless it be held a fault not to foresee and provide against future alterations in the construction of the law—must be radically wrong. Such a principle or rule of law would clog business transactions, unsettle titles, and destroy all confidence in the decisions of the Supreme Court of the state. We hold * * * that rights to property, and the benefits of investments acquired by contract, in reliance upon a statute as construed by the Supreme Court of the State, and which were valid contracts under the statute as thus interpreted when the contracts or investments were made, cannot be annulled or divested by subsequent decisions of the same court, overruling the former decisions; that as to such contracts or investments it will be held that the decisions which were in force when the contracts were made, had established a rule of property upon which the parties had a right to rely, and that subsequent decisions cannot retroact so as to impair rights acquired in good faith under a statute as construed by former decisions."

In the Saffell case the purchaser, however, was on notice that a chancery suit was still on the docket in which there had been infant defendants, entitled to claim this land. One of them on attaining majority attacked the decision holding the certificate of acknowledgment to be defective, and the lower court annulled the former decree and was sustained by the Supreme Court. So we do not think the purchaser in this case had a right to complain; but we cannot agree with the conclusion of the Court that a purchase

between the time of the decisions of the Hockman and Clinch River cases and the Geil case should not have the right to insist that he relied upon those decisions in making his purchase and be protected by them.

The Syllabus.

The importance of the syllabus to reported cases can hardly be overestimated. It is more frequently quoted, as a general rule, than the case itself. Virginia has been very fortunate in her Reporters, and never more so than in the present distinguished lawyer and teacher who has been the Reporter of our Supreme Court decisions for the past fifteen years. But Homer sometimes nods, and in the syllabus to Saffell *v.* Orr heretofore commented on, the second clause of the syllabus is hardly in consonance with the opinion. The syllabus reads "A *sporadic decision* contrary to the weight of authority in the same jurisdiction does not constitute a rule of property under the doctrine of *stare decisis.*" There can be no question that this part of the syllabus states unquestioned law. But there is nothing in the opinion of the Court as to the effect of a *sporadic case.* The Court calls attention to *two cases* which had been overruled by a third and in that third case these *two cases* were held not to constitute a rule of property. And the Court in the case under decision re-affirms and approves the third case; thus deciding that two cases do not constitute a rule of property. The Court leaves us in ignorance of the exact number required and the profession should take due notice thereof and be careful how they advise upon a question of title, where only two cases support their view of any doubtful question.

The syllabus in Randall *v.* Harrison, p. 686, is hardly full enough, but that is hardly the Reporter's fault. The main argument for the appellant in this case was based upon two points—one: that the testator provided that only so much of his estate as would afford his wife a decent maintenance should be used by her; and the other, that the language "it is my wish and injunction—which I know will be faithfully carried out by my dear wife—that the *principal* of any amount left from my estate" (after payment of debts, etc.) "be drawn upon *only to supply her own ne-*

cessities," constituted a precatory trust, thus taking the case out of the purview of the doctrine of May *v.* Joynes.

The Court in its opinion did not allude to either of these questions, and the Reporter can hardly be held responsible for the syllabus, though in our judgment he should have quoted a little more of the will.

It would have been a very foolish lawyer who would have advised an appeal if the question had been merely the solitary one presented in the syllabus.

Legislative Session of 1910.

The Legislature of 1910 has passed into history or oblivion—whichever way you look at it, and upon the whole has been a conservative, hard-working body. Much foolish legislation was proposed and in some instances strenuously insisted upon; but was either sidetracked or killed. We hope in the next number to give a resumé of any important changes in the general laws. Upon the whole we think the general work of this body has been well done, amazingly well done when the time limit is taken into consideration.

Oaths.

Our English brethren are having a time of it over their new "Oaths Act." It seems that the fear of germs has reached the Parliament and jurors—grand and petit—and witnesses are no longer required to "kiss the book." In lieu, however, of a simple act allowing a witness to be sworn by raising his hand instead of kissing the book, a very long act with forms of oaths, etc., was passed, and it is rather amusing to the American lawyer to read the different views the judges have held upon the proper way of administering oaths. Some of the courts have had the form printed on a card and hand it to the witness to read. A witness to whom such a card was handed gave it back and said he could not read, whereupon the presiding judge denounced the "Oaths Act" as "a wretched piece of business." A grand jury struggled at the form awhile and some of them requested the judge to let them be sworn in the old way, which request was granted, the

judge observing that he saw no reason why they should not run the risk if they desired and that in his opinion the act caused inconvenience in swearing a grand or petit jury, though he thought it was rather effective with most witnesses. It is strange how hard it is to break away from an old habit and how the courts balk at any breach of custom. Why a witness should not be sworn by holding up his hand as well as by kissing the Bible is a question easy to answer it seems to us. It is true the oaths as administered in most courts are a mere gabble of words and if the English Act does in any way add to the solemnity of the function, a little inconvenience ought not to be quarrelled with.

We once examined the "New Testament" used in a Mountain County and which had been used for generations, we were told. It was carefully tied up with what had once been red tape, and on rashly opening it after some trouble, we found it to be a copy of Watts' Hymns of the vintage of 1794. *Quære,* could a witness have been indicted for perjury who had been sworn on this book and made a false statement? He was certainly not "duly sworn."